Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITIONER'S APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD,
Plaintiff-Appellant,

v.

PIERCE COUNTY, a municipality and governmental subdivision of the State of Washington; JOHN SHIELDS, Sheriff of Pierce County; PAUL THRASH, individually and as Pierce County Deputy Sheriff; TERRILL LARSON, individually and as Pierce County Deputy Sheriff; P. DONNELLY, individually, and as Pierce County Deputy Sheriff,
Defendants-Appellees.

No. 96-35614
D.C. No.
CV-94-05658-RJB
OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
November 7, 1997—Seattle, Washington

Filed February 27, 1998

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain,
Circuit Judges, and William W Schwarzer,* District Judge.

Opinion by Judge Fletcher; Partial Concurrence and
Partial Dissent by Judge O'Scannlain

*Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Appeals

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a federal civil action, a legally correct proposed jury instruction may serve as an objection to the instruction actually given by the district court for the purpose of preserving the issue on appeal.

When deputies of appellee Pierce County, Washington's Sheriff's Department attempted to disperse a group of trespassers on a private island, appellant Herbert Gulliford suggested that the officers "hop on the ferry" and leave. One of the deputies, appellee Paul Thrash, placed Gulliford under arrest for obstructing a public servant in violation of Washington law. Two other deputies helped Thrash subdue Gulliford with pepper spray and the application of physical force when he passively resisted arrest.

No charges were ever filed against Gulliford. He brought a federal civil rights action against Thrash, the other deputies, Pierce County, and appellee Sheriff John Shields, alleging wrongful arrest and use of excessive force in violation of his First, Fourth, and Fourteenth Amendment rights.

At trial, the district court rejected Gulliford's proposed jury instruction on the issue of probable cause to arrest, which correctly stated that the First Amendment protects the right of citizens to verbally oppose and/or challenge police action, so long as it does not involve a threat or fighting words. The parties also discussed jury instructions off the record in chambers.

On the issue of probable cause to arrest, the district court gave Jury Instruction Number 15, which stated that a citizen has the right to verbally oppose and/or challenge police action

without risking arrest, so long as it does not "hinder, delay, or obstruct" a public servant in the discharge of the public servant's powers or duties. Gulliford objected to this instruction in open court. The court also gave Jury Instruction Number 14, which was based on federal law, and described the scope of an individual's limited right to resist an arrest made without probable cause.

The jury returned a defense verdict.

On appeal, Gulliford contended that Jury Instructions 14 and 15 were erroneous. He faulted Instruction 15 for failing to state that verbal protests or challenges to the police are permitted, even if they knowingly hinder, delay, or obstruct the police. Citing a Washington case, Gulliford asserted that Instruction Number 14 was improper because it was based on federal law, rather than the law of Washington State.

Pierce County countered that Gulliford was barred under Fed. R. Civ. P. 51 from attacking Instruction 15 on appeal, because he failed properly to object at trial by specifying the First Amendment's claimed effect on probable cause. Rule 51 provides that a party may not assign as error the giving or failure to give a jury instruction unless the party objects before the jury retires to begin deliberation, stating distinctly the matter objected to and the grounds of the objection. The County also contended that Thrash was entitled to qualified immunity on the wrongful arrest claim, and that all the deputies were entitled to qualified immunity on Gulliford's excessive force claim.

[1] It is the responsibility of litigants to ensure compliance with Rule 51, which the Ninth Circuit has interpreted "strictly." However, the Ninth Circuit has recognized a limited exception to the strict interpretation of Rule 51: where the district court is aware of the party's concerns with an instruction, and further objection would be unavailing, a futile formal objection will not be required. Such an objection is a

pointless formality when (1) throughout the trial the party argued the disputed matter with the court; (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction; and (3) the party offered an alternative instruction.

[2] Gulliford met the requirements of the "pointless formality" test. [3] Gulliford's proposed instruction was an accurate statement of the law that should have brought to the court's attention the failure of the general charge to adequately address the issue of probable cause. Such a proposed instruction would be sufficient despite the party's failure to object to the instructions as given. Not only did Gulliford propose an alternative instruction, he objected in open court to Instruction Number 15, albeit in less specific terms, and additional discussions regarding the jury instructions occurred off the record in chambers. The district court knew of Gulliford's grounds for disagreement. The proposed probable cause instruction served as an objection to the instruction given to the jury. As a result, Gulliford was not precluded from raising his objection to Instruction Number 15 on appeal.

[4] The First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [5] Instruction Number 15 misstated the law, or at best was misleading, since it did not state that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes "fighting words." Instruction 15 was impermissibly misleading, warranting reversal unless the error was harmless.

[6] In a civil case, if a jury instruction is erroneous, the court of appeal will reverse the judgment unless the error is more probably than not harmless. In this case, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone, because

that is all that Gulliford did—he spoke. The words were not "fighting words." Accordingly it was necessary to reverse and remand for a new trial.

[7] The Washington state case Gulliford cited states that a person being illegally arrested may use reasonable and proportional force to resist the arrest. This "reasonable and proportional" standard is to all appearances identical to the one in Instruction Number 14. **[8]** Accordingly, the district court did not err in instructing the jury under federal law rather than Washington State law with regard to Gulliford's claim that the arresting officers used excessive force.

[9] Pierce County neglected to explain why it did not cross-appeal from the district court's denial of qualified immunity from Gulliford's wrongful arrest and excessive force claims. **[10]** An appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights. **[11]** Even if Pierce County had cross-appealed, it did not appear that the district court erred in denying the officials qualified immunity.

Judge O'Scannlain dissented in part, concluding that the judgment should have been affirmed because Gulliford's trial objection to Instruction Number 15 did not address the issue of his Fourth Amendment right against arrest without probable cause.

COUNSEL

Joel Feldman, Lakewood, Washington, for the plaintiff-appellant.

Daniel Hamilton, Tacoma, Washington, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Herbert Gulliford appeals the judgment entered following a jury trial in his 42 U.S.C. § 1983 action against Pierce County and various law enforcement officials alleging that his constitutional rights were violated when he was arrested for obstructing a public servant and resisting arrest. Gulliford contends that the district court erred in its instructions to the jury regarding his wrongful arrest and excessive force claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for a new trial.

I.

On the evening of September 6, 1992, a group of individuals were gathered around a fire on the north beach of Herron Island, a small privately owned island located just within the borders of Pierce County, Washington, west of Key Peninsula. At about 9:20 p.m. that night, the Pierce County Sheriff's Department ("PCSD") received a call that someone in the environs of the group had threatened a woman's family. About two hours later, the PCSD received a report that "J.D.", a member of the group gathered on the beach, had threatened a firefighter who attempted to extinguish the group's fire. In response, the three named deputy sheriffs, Thrash, Larson and Donnelly, were dispatched to the island to arrest J.D. and extinguish the fire.

Upon arriving on the island, the deputies were informed that J.D. had gone home. Deputy Thrash told the group, "This party is over, people," but none of the members left the beach. In response to Deputy Thrash's next statement that "I'm tired of this. This is a waste of government . . . ," Gulliford replied, "Then why don't you hop on the ferry, hop on the ferry and go back." Deputy Thrash then maneuvered through the crowd, grabbed Gulliford from behind, and placed him under arrest

for obstructing a public servant in violation of Wash. Rev. Code. § 9A.76.020.[1]

At this point, Gulliford intentionally fell to a sitting position and refused to comply with orders to stand and put his hands behind his back. The deputies grabbed Gulliford's arms, put him in a "hair hold," and placed a knee in his back. Although Gulliford did not kick out at or otherwise assault the officers, he continued passively to resist arrest. Deputies Larson and Donnelly then sprayed pepper spray in Gulliford's face. The deputies were eventually able to get one of Gulliford's wrists in handcuffs, and, after a second spraying in the face with pepper spray, Gulliford ceased resisting. Gulliford was additionally cited for resisting arrest pursuant to Wash. Rev. Code § 9A.76.040.[2]

Gulliford was taken to the Pierce County Jail and held there until he posted bond. The deputies never claimed that they thought that Gulliford was "J.D.", and no charges were ever filed against Gulliford. Gulliford contends that he suffered permanent injuries as a result of the officers' use of force in effecting the arrest.

Claiming that he was wrongfully arrested and that the deputies used excessive force in violation of his First, Fourth and Fourteenth Amendment rights, Gulliford filed this § 1983 action against Pierce County, Pierce County Sheriff John Shields, and, in their individual as well as official capacities, the three deputies, Thrash, Larson and Donnelly. The claims

[1]Wash. Rev. Code § 9A.76.020 provides in pertinent part: "Every person who . . . (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor."

[2]Wash. Rev. Code § 9A.76.040 provides: "(1) A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. (2) Resisting arrest is a misdemeanor."

against Pierce County, however, were dismissed by stipulation of the parties on October 30, 1995.[3]

The case was tried for three weeks before an eight person jury, although the wrongful arrest claims as to Larson and Donnelly were dismissed on defendant's motion for a directed verdict and were never submitted to the jury. The jury returned verdicts for Deputy Thrash on the wrongful arrest claim and for all defendants on the excessive force claim.

II.

Gulliford contends that two of the instructions given to the jury were erroneous. "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir. 1996). When the alleged error is in the formulation of the instructions, the instructions are to be considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate. *Masson v. New Yorker Magazine, Inc.,* 85 F.3d 1394, 1397 (9th Cir. 1996). However, when the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. *Fireman's Fund Ins. Cos. v. Alaskan Pride Partnership,* 106 F.3d 1465, 1469 (9th Cir. 1997).

A.

Jury Instruction Number 15 stated in pertinent part:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action with-

[3]The references in this opinion to arguments by "Pierce County" refer to Pierce County Deputy Prosecuting Attorney Daniel R. Hamilton, who argued the instant appeal on behalf of the Pierce County Deputy Sheriffs.

> out risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties.

On appeal, Gulliford claims that his arrest for Obstructing a Public Servant was without probable cause. He contends that Jury Instruction Number 15 does not state a crime because verbal protests or challenges to the police are permitted, even if they knowingly hinder, delay or obstruct the police. To be criminal, the words must be fighting words. He makes the further point that § 9A.76.020, which prohibits hindering, delaying or obstructing a public servant, criminalizes conduct only, not words. He is correct.

As a preliminary matter, Pierce County argues that Gulliford is precluded from raising this issue on appeal because he failed to object properly at trial. Specifically, Pierce County contends that the record of Gulliford's exceptions to Jury Instruction Number 15 "is devoid of any mention of the First Amendment's claimed effect on probable cause . . . ."[4]

[1] Federal Rule of Civil Procedure 51 provides that "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." It is the responsibility of the litigants to ensure compliance with FRCP 51, and we have generally interpreted that rule "strictly." *McGonigle v. Combs,* 968 F.2d 810, 823 (9th Cir.), *cert. dis-*

[4]Pierce County asserts that the entirety of Gulliford's argument to the District Court regarding Jury Instruction Number 15 was as follows:

> It does not include a claim for specific First Amendment violation, and as we indicated in our trial brief and in discussion previously with the court, we believe that both the First Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

missed, 506 U.S. 948 (1992). However, we have recognized "a limited exception" to the strict interpretation of FRCP 51: " 'Where the district court is aware of the party's concerns with an instruction, and further objection would be unavailing, we will not require a futile formal objection.' " *Id.* (citation omitted). Specifically, we have held that such an objection is a pointless formality " 'when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction.' " *Glover v. BIC Corp.,* 6 F.3d 1318, 1326 (9th Cir. 1993) (quoting *United States v. Payne,* 944 F.2d 1458, 1464 (9th Cir. 1991), *cert. denied,* 503 U.S. 975 (1992)).

[2] Gulliford meets the requirements of the "pointless formality" test. The instruction he proposed (No. 31) stated:

> Defendants claim that they had probable cause to arrest plaintiff for obstructing a police officer in the conduct of his lawful duties. The First Amendment protects the right of citizens to verbally opposed and/ or challenge police action so long as that challenge does not involve a threat or fighting words.
>
> * * *
>
> *City of Houston v. Hill,*
> 482 U.S. 451, 462, 107 S.Ct. 2502, 2510 (1987)

[3] As in *Glover v. BIC Corp.,* Gulliford's proposed instruction was an "accurate statement[ ] of the law which should have brought to the court's attention the failure of the general charge to adequately address the issue of" probable cause. 6 F.3d at 1327. In *Glover,* we held that such a proposed instruction was sufficient despite the party's failure to object to instructions as given. *Id.* Here, in contrast to *Glover,* not only did Gulliford propose an alternative jury instruction, he

also objected in open court to Jury Instruction Number 15, albeit in less specific terms, and the parties concede that additional discussions regarding the jury instructions occurred off the record in chambers.[5] We are thus satisfied that the district court knew of Gulliford's grounds for disagreement, and that, on the instant record, the "proposed [probable cause] instruction[ ] will serve as an objection to the instructions given the jury." *Id.*; *cf. United States v. Payne*, 944 F.2d 1458, 1463-64 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992) (specific objection not a "pointless formality" where it was clear from the record that failure to give a presumption of innocence instruction was due to simple oversight and counsel failed to alert the court to the omission when it pointedly asked whether there were any objections to the instructions read to the jury). As a result, Gulliford is not precluded from raising on appeal his objection to Jury Instruction Number 15.[6]

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[5]Pierce County cites *Benigni v. City of Hemet*, 879 F.2d 473, 475-76 (9th Cir. 1988), for the proposition that, notwithstanding Gulliford's proposed alternative jury instruction, his objection was not properly preserved because "the trial court was not made aware of any specific concern with the proposed instructions." However, unlike Gulliford, the litigant in *Benigni* made no oral objection or argument whatsoever at trial. *Id.* at 476. Pierce County concedes that Gulliford by contrast did make an oral objection to Jury Instruction Number 15 specifically regarding the First Amendment. Although the precise articulation of Gulliford's First Amendment argument was not as artfully presented in his oral objection as it was in his alternative jury instruction, it was sufficient to give the court "an opportunity to modify the instruction and incorporate the elements of the . . . proposed instructions." *Id.*

[6]Judge O'Scannlain's partial dissent suggests that this case is controlled by *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1990), in which we held that Southmark failed to comply with the requirements of FRCP 51 notwithstanding the fact that Southmark offered an alternative jury instruction. *See* infra at 1626, 1629–30. However, in contrast to the instant case, the alternative jury instruction in *Grosvenor* failed "to state distinctly the matter objected to and the ground of the objection as required by Rule 51." 896 F.2d at 1153. Gulliford's proposed jury instruction, on the other hand, precisely articulated the matter objected to and the grounds of the objection, much like the alternative

[4] The Supreme Court has consistently held that the First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is " 'shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.' " *City of Houston, Texas v. Hill,* 482 U.S. 451, 461-63 (1987) (quoting *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)); *see also Lewis v. City of New Orleans,* 415 U.S. 130, 132-134 (1974).

In *Hill,* a case with facts substantially similar to those before us, the appellee shouted at police officers who had approached his friend to "pick on somebody your own size." *Id.* at 454. Hill was arrested under a city ordinance that prohibited "oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty." *Id.* at 455. Although Hill was acquitted, he brought an action seeking to strike the ordinance as unconstitutional on its face. *Id.* The Supreme Court agreed, emphasizing that "[t]he Constitution does not allow such speech to be made a crime," and that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63.

Similarly, in *Lewis v. City of New Orleans,* as later recounted in *Hill,* the appellant yelled obscenities at an officer who had asked appellant's husband to produce his driver's license. *Id.* at 461. Lewis was convicted under a municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobious language

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instruction in *Brown v. Avemco Inv. Corp.,* 603 F.2d 1367 (9th Cir. 1979), cited with approval in *Grosvenor,* 896 F.2d at 1153. As we noted in *Grosvenor,* the plaintiff in *Brown* adequately complied with the requirements of FRCP 51 because his proposed instruction was sufficiently clear to focus the issue for the jury. *See id.*

toward or with reference to any member of the city police while in the actual performance of his duty." *Lewis,* 415 U.S. at 132. The Supreme Court vacated the conviction and invalidated the ordinance as facially overbroad, explaining that the ordinance was not limited in scope to "fighting words" that " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' " *Id.* at 133 (quoting *Gooding v. Wilson,* 405 U.S. 518, 525 (1972)).

Relying, *inter alia,* on the Supreme Court's decision in *Hill,* we ruled in *Mackinney v. Nielsen* that expressive conduct such as writing with chalk on the sidewalk does not itself create probable cause for arrest, and that verbally protesting an officer's order to stop writing is protected by the First Amendment. *See* 69 F.3d 1002, 1007-08 (9th Cir. 1995). The decision in *Mackinney* also relied on *Duran v. City of Douglas,* in which we emphasized that "criticism of the police is not a crime," and that "while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful but protected by the First Amendment." 904 F.2d 1372, 1377, 1378 (9th Cir. 1990).

[5] The facts before us are indistinguishable from those in *Hill* and its progeny. If anything, Gulliford's suggestion that Deputy Thrash "hop on the ferry"[7] is less provocative than the

[7]Pierce County contends that Gulliford's statement included profanity. However, the testimony of the PCSD deputies is somewhat inconsistent on this point. Deputy Thrash wrote in his report that Gulliford said "Then why don't you get the fuck off the island." Deputy Donnelly wrote in his report that "A person on the far side of the fire said why don't you leave the fuckin[g] island. [Deputy Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." Finally, Deputy Larson wrote that "Thrash told them to leave and told them we were tired of coming over to stop these problems, no one moved and a male voice to my right said something to the effect of 'Then get the hell off the island.' Thrash walked over and grabbed the only male around, he had been crouching down between two women when he said it. Thrash told him he was under arrest . . . ." In any event, whether Gulliford may have used profanity does not affect the analysis.

"opprobious language" found in those cases. Jury Instruction Number 15 misstates the law or is at best misleading since it does not state that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes "fighting words." *See Hill,* 482 U.S. at 465-67; *see also Mackinney,* 69 F.3d at 1007-08; *Duran,* 904 F.2d at 1377-78. We agree that Jury Instruction Number 15 was impermissibly misleading, warranting reversal unless the error was harmless.

[6] In a civil case, "[i]f a jury instruction is erroneous, we will reverse the judgment unless the error is more probably than not harmless." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir. 1996). Here, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone because that is all that Gulliford did—he spoke. As a matter of law, the words spoken were not "fighting words." Accordingly, we reverse and remand for a new trial on this claim.

B.

Jury Instruction Number 14 stated:

> An individual has a limited right to offer reasonable resistance to an arrest made without probable cause, but only if the arrest is the product of the officer's bad faith, provocative conduct, or personal frolic. In such a case, the amount of force used to resist an unlawful arrest must be reasonable and proportioned to the injury attempted upon the arrestee.

On appeal, Gulliford argues that this jury instruction was erroneously based on federal law rather than Washington State law.

[7] The objection is not well taken. We need not go beyond the observation that the Washington law on this point is substantially indistinguishable from the federal law. The Wash-

ington state case quoted by Gulliford states that a "person being illegally arrested may use reasonable and proportional force to resist the arrest." *State v. McCrorey,* 851 P.2d 1234 (Wash. Ct. App. 1993) (citing *State v. Hornaday,* 713 P.2d 71 (Wash. 1986)). This "reasonable and proportional" standard is to all appearances identical to the one found in Jury Instruction 14.

[8] Accordingly, the district court did not err in instructing the jury under federal rather than Washington State law with regard to Gulliford's claim that the arresting officers used excessive force.

III.

[9] Pierce County argues on appeal that Deputy Thrash is entitled to qualified immunity from Gulliford's wrongful arrest claim and that all of the deputies are entitled to qualified immunity from Gulliford's excessive force claim. However, Pierce County neglects to explain why it did not cross-appeal on this issue from the district court's denial of its motion seeking qualified immunity.

[10] As we recently reiterated, "[a]n appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." *Spurlock v. FBI,* 69 F.3d 1010, 1018 (9th Cir. 1995) (citing *Turpen v. City of Corvalis,* 26 F.3d 978, 980 (9th Cir.), *cert. denied,* 513 U.S. 963 (1994)).

[11] Moreover, even if Pierce County had cross-appealed, it does not appear that the district court erred in denying the officials qualified immunity. As we explained in *Mackinney v. Nielsen,* "the Supreme Court instructed courts ruling on qualified immunity to examine whether the 'contours of the right' at stake in the action are sufficiently clear so that a reasonable official could understand that he or she is violating

the right." 69 F.3d 1002, 1006-07 (9th Cir. 1995). We ultimately concluded in that case that

> Police officers have a difficult job, and they deserve the respect of their community. But they in turn must respect the right of individuals in that community to question their government and the role of the police. A reasonable officer should have known that Mackinney was simply exercising that right.
>
> *Id.* at 1007.

AFFIRMED in part, REVERSED in part, and REMANDED for a new trial. Appellee to bear costs.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the district court. Regrettably, I cannot join Section II.A's discussion of the jury instruction on verbal opposition to police action, which, in my view, threatens "[t]his court['s] . . . reputation as the strictest enforcer of Rule 51," *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991), and creates a direct intra-circuit conflict with *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149 (9th Cir. 1990). Therefore, I respectfully dissent and would not reach the question of qualified immunity, which the majority discusses in Part III.

I

Federal Rule of Civil Procedure 51 states:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict,

> *stating distinctly* the matter objected to and *the grounds of the objection.*

Fed. R. Civ. P. 51 (emphasis added). Our court has "interpreted this rule strictly and ha[s] stated that, '[i]n a civil case, we may not review a jury instruction in the absence of a proper objection.' " *McGonigle v. Combs,* 968 F.2d 810, 823 (9th Cir. 1992) (quoting *Larez v. City of Los Angeles,* 946 F.2d 630, 638 (9th Cir. 1991)); *see also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 674 (1971) ("[T]he Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to instruction in a civil case.") The party objecting to the instruction must bring "into focus *the precise nature* of the alleged error in the district court's instruction." *McGonigle,* 968 F.2d at 824 (emphasis added).

Gulliford now argues that he was arrested for obstructing a police officer without probable cause in violation of the Fourth Amendment. He does not claim on appeal that his First Amendment right verbally to hinder, delay, or obstruct the police was also violated.

Gulliford correctly argues before this court that jury instruction 15[1] was flawed because it failed to inform the jury that the police lacked probable cause to arrest him for speech that "knowingly hinder[ed], delay[ed], or obstruct[ed]" the police but did not include "fighting words [ ]or . . . obscene or opprobrious language." *Houston v. Hill,* 482 U.S. 451, 461 (1987). Gulliford's objection to jury instruction 15 at trial rested on an entirely different ground. Gulliford's argument was as follows:

---

[1]Jury instruction 15 stated:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties.

> [The instruction] does not include a claim for a specific First Amendment violation, and as we indicated in our trial brief and in discussions previously with the court, we believe that both the First Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

In other words, Gulliford argued at trial that instruction 15 did not separately address his (now abandoned) claim that his First Amendment rights had been violated as well. Gulliford's (perhaps incorrect) argument was that the instruction *was exclusively concerned with* his Fourth Amendment claim — not that the instruction *misstated the elements of* that claim.

Of course, the contours of Gulliford's Fourth Amendment claim are shaped both by Wash. Rev. Code § 9A.76.020 — the Washington statute that prohibits obstruction of law enforcement officers — and by the First Amendment. Section 9A.76.020 provides: "Every person who . . . (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor." Meanwhile, the First Amendment gives individuals the right to verbally obstruct public servants as long as they do not use "fighting words [ ]or . . . obscene or opprobrious language." *Houston v. Hill,* 482 U.S. 451, 462 (1987). Viewed in conjunction with Wash. Rev. Code § 9A.76.020, the First Amendment helps to define Gulliford's right under the Fourth Amendment not to be arrested for obstructing the police without probable cause.

However, Gulliford's objection at trial to jury instruction 15 had nothing to do with his rights under the Fourth Amendment. Rather, Gulliford wanted the district court to instruct the jury *separately* regarding an alleged violation of his First Amendment right to verbally obstruct police officers. Because Gulliford failed to "*stat[e] distinctly* the matter objected to and the grounds of [his] objection [at trial]," Fed. R. Civ. P.

51 (emphasis added), he is precluded from raising his Fourth Amendment argument on appeal.

II

The majority invokes the "pointless formality" exception to Rule 51. As we explained in *United States v. Payne,* 944 F.2d 1458 (9th Cir. 1991), "an objection may be a 'pointless formality' when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." *Id.* at 1464.

It is undisputed by the parties that Gulliford offered an alternative instruction. Gulliford has failed to demonstrate, however, either that "throughout the trial [he] argued the disputed matter with the court," or that "*it is clear from the record* that the court knew [Gulliford's] grounds for disagreement with the instruction." *Id.* (emphasis added). Apart from noting that Gulliford submitted an alternative instruction (thereby satisfying only the third element of the pointless formality test), the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here.

In *Grosvenor Properties Ltd. v. Southmark Corp.,* 896 F.2d 1149 (9th Cir. 1990), the defendants submitted an alternative jury instruction that was rejected by the district court. *See id.* at 1152. At a sidebar conference called to consider the instructions, the defendants stated that their proposed instruction had not been given. *See id.* The district court responded that it had rejected the instruction and that it was unnecessary for counsel to repeat previously submitted instructions or objections. *See id.* We held that such a "sequence of events is not sufficient to constitute a sufficient objection to the instructions that were given, as Rule 51 is applied in this circuit." *Id.* If the defendants in *Grosvenor* did not succeed in

preserving their objection despite complaining that their proposed instruction had not been given, then certainly Gulliford, who did nothing to call attention to the district court's rejection of his instruction, failed to preserve his objection.

In an attempt to distinguish *Grosvenor,* the majority relies upon a sentence from that opinion. *See* Majority Opinion at 1621 n.6 ("However, in contrast to the instant case, the alternative jury instruction in *Grosvenor* failed 'to state distinctly the matter objected to and the ground of the objection as required by Rule 51.' ") (quoting *Grosvenor,* 896 F.2d at 1153). The relevant passage in *Grosvenor,* however, states, in full:

> Southmark argues that it made the required specific objection to the instruction that failed to state that termination of the joint venture would end fiduciary duty, and that it submitted alternative theories of liability to the jury by way of special verdict questions. It contends that it did so by its submission of proposed jury instruction 22. In addition, at a sidebar conference called to consider corrections and additions to the instructions, Southmark's counsel stated that instruction 22 had not been given and the court responded that it had rejected that instruction. At that same conference the court noted that it was not necessary for counsel to repeat previously submitted instructions or objections.
>
> *However, this sequence of events is not sufficient to constitute a sufficient objection to the instructions that were given, as Rule 51 is applied in this circuit.* This court has held that remarks made by counsel in chambers, discussion of law in pretrial memoranda and mere submission of proposed instructions did not clearly show that the issue was focused before the court.

> *In addition,* an examination of proposed instruction 22 suggests that it was not sufficient to state distinctly the matter objected to and the ground of the objection as required by Rule 51.

Id. at 1152-53 (internal citations omitted). As the above passage demonstrates, our *holding* in *Grosvenor,* that a "sequence of events" which includes the submission of an alternative jury instruction does not "constitute a sufficient objection to the instructions that were given," did not turn on whether that alternative instruction "state[d] distinctly the matter objected to and the ground of the objection." *Id.* Although we observed ("addition[ally]") in *Grosvenor* that the alternative instruction was unclear, *id.* at 1153 (citing *Brown v. Avemco Inv. Corp.,* 603 F.2d 1367, 1371 (9th Cir. 1979)), the clarity of the alternative instruction was irrelevant to *Grosvenor*'s analysis of the "sufficien[cy]" of the relevant "sequence of events." *Id.* at 1152. Far from distinguishing *Grosvenor,* the majority's discussion of that case demonstrates why the majority opinion is in direct conflict with it.

I respectfully dissent.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD Plaintiff-Appellee, v. PIERCE COUNTY, a municipality and governmental subdivision of the State of Washington JOHN SHIELDS, Sheriff of Pierce County; PAUL THRASH, individually and as Pierce County Deputy Sheriff; TERRILL LARSON, individually and as Pierce County Deputy Sheriff; P. DONNELLY, individually, and as Pierce County Deputy Sheriff, Defendants-Appellees.	)	No. 96-35615 D.C. No. CV-94-05658-RJB ORDER

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* District Judge.

Judges Fletcher and Schwarzer vote to deny the petition for rehearing.

Judge O'Scannlain would grant rehearing.

Judge Fletcher votes to deny the

Appendix "B"

suggestion for rehearing en banc and Judge Schwarzer so recommends. Judge O'Scannlain would grant the rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. **U.S. Const. Amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. **U.S. Const. Amend. IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

III. **42 U.S.C. § 1983:**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IV. **RCW 9A.76.020 Obstructing a law enforcement officer.**

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other

public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor. [1995 c 285 § 33; 1994 c 196 § 1; 1975 1st ex.s. c 260 § 9A.76.020.]

V. **RCW 9A.84.020 Failure to disperse.**

(1) A person is guilty of failure to disperse if:

(a) He congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

(2) Failure to disperse is a misdemeanor. [1975 1st ex.s. c 260 § 9A.84.020.]